IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

Nos. 567 and 568

FEDERAL COMMUNICATIONS COMMISSION,
*Petitioner,*

*v.*

RCA COMMUNICATIONS, INC.,
*Respondent.*

MACKAY RADIO AND TELEGRAPH COMPANY, INC.,
*Petitioner,*

*v.*

RCA COMMUNICATIONS, INC.,
*Respondent.*

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

## BRIEF FOR RESPONDENT IN OPPOSITION.

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## BRIEF FOR RESPONDENT IN OPPOSITION.

### Opinions Below.

The opinions of the Court below (R. 696-707) and the opinions of the Federal Communications Commission (R. 550-654) have not yet been reported.

### Jurisdiction.

The jurisdictional requisites are set forth in the Petitions.

## Questions Presented.

Petitioners discuss only one issue raised by the decision of the majority of the Federal Communications Commission and submitted to the Court below, namely, whether the Commission may authorize duplicative radio circuits* despite its findings that no benefit, but rather harm to the public, will result. The Petitioners ignore two additional issues. Thus, not one, but three questions are presented:

(1) May the Commission, despite its findings that:

(a) existing radio and cable facilities are greatly in excess of those required to handle present and expected traffic;

(b) there is active competition between radio and cable carriers and the transatlantic telephone services of American Telephone & Telegraph Company ("A. T. & T.") and airmail; and

(c) neither lower rates nor superior service will result;

authorize a duplicative radio circuit under the common carrier licensing standard of the Communications Act of 1934? (*infra* pp. 9-13.)

(2) May the Commission, despite its findings that common ownership of the radio carrier applicant and a cable carrier has impaired competition between them and will be used to divert substantial traffic from the cable company to

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* A wasteful forked circuit is involved whereby both United States carriers must maintain separate stations in the United States to communicate with the single correspondent and station in Portugal. When traffic is being transmitted to one of the points on the forked circuit, no traffic can be handled to the other points on the circuit at the same time.

the radio applicant, sanction this result—which violates the requirement of Section 314 of the Communications Act that competition between the two media must be maintained? (*infra* pp. 13-17.)

(3) May the Commission authorize a radio carrier to operate under "tying" agreements pursuant to which, as the Commission found, the radio applicant will siphon off and convert its cable affiliate's traffic into radio traffic and trade it for return radio traffic, thus foreclosing a radio carrier, having no cable affiliation, from competition for that substantial traffic? (*infra* pp. 17-19.)

## Statute Involved.

The statute involved is the Communications Act of 1934, 48 Stat. 1064 (1934), 47 U. S. C. §151 *et seq.* (1946), as amended (herein called the "Communications Act"). The pertinent portions of Sections 1, 309(a), 313 and 314 thereof are set forth in Appendix A hereto.

## Statement.

The Court below reversed (R. 708) that part of a decision and order of the Commission (two Commissioners dissenting) which granted the applications of Mackay Radio and Telegraph Company, Inc. ("Mackay Radio") to open duplicative radio circuits, direct and by relay via Tangier, between the United States and The Netherlands and a direct radio circuit between the United States and Portugal (R. 630-632).*

* The Commission denied the application of Mackay Radio for a direct circuit between the United States and Surinam (R. 630-632). This part of the Commission's decision was not brought up for review.

Mackay Radio and the Commercial Cable Company ("Commercial Cable") are both wholly-owned subsidiaries of American Cable and Radio Corporation ("AC&R"), which in turn is controlled by the International Telephone and Telegraph Corporation. Mackay Radio and Commercial Cable form a part of the international radio and cable system of the International Telephone and Telegraph Corporation (R. 555).

Common carrier service with The Netherlands and Portugal is provided by the cable facilities of Commercial Cable and of The Western Union Telegraph Company, by the direct radio circuits of RCA Communications, Inc. ("RCAC") and, in the case of Portugal, by an indirect radio circuit of Mackay Radio (R. 604).

Even during peak periods, and for the predictable future, RCAC alone has more than adequate facilities to meet the entire public requirement for all service with The Netherlands and Portugal. *In fact, RCAC's average excess capacity to and from these points is 90% and 78%, respectively* (R. 131-132, 516-517).* In addition to this tremendous over-capacity, there is available to the public the transatlantic telephone services of A. T. & T. and the airmail (R. 570, 583).

The Commission found:

> (1) The capacity of the existing facilities was in excess of that required to handle present and expected traffic (R. 604).
>
> (2) Active and substantial over-all competition existed for traffic with the points at issue, between cable carriers, between cable and radio carriers, in the case of Portugal between radio carriers, and between the service provided by these carriers and the airmail and the transatlantic telephone services of A. T. & T. (R. 606, 612).
>
> (3) The operations of Mackay Radio to each of the points at issue:

* Italics ours throughout.

(a) will not result in lower rates (R. 605);

(b) will not result in speedier service (R. 605);

(c) will not otherwise be superior to or more comprehensive than the service available via RCAC (R. 605).

(4) The operations of Mackay Radio:

(a) will not generate new traffic but redistribute existing traffic and, in view of the effect upon industry revenue and costs, will result in an "impact" on the rate structure (R. 606-607);

(b) will reduce total revenue for the United States communications system (R. 578, 591);

(c) may require additional scarce radio frequencies (R. 629); and

(d) will require a forked circuit to Portugal resulting in both United States carriers maintaining separate stations in the United States to communicate with the single station in Portugal (R. 588-589);

(e) *will create a danger that the government-controlled radio communications monopolies in The Netherlands and Portugal will play off one United States carrier against the other to the detriment of the United States communications system* (R. 622-623).

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The Commission found with respect to the effect of Mackay Radio's operations upon competition between cable and radio:

(1) There is an increasing tendency toward the consolidation of the operations of Mackay Radio and Commercial Cable, wholly-owned subsidiaries of AC&R, including the joint determination of rates (R. 566, 258-259, 272).

(2) AC&R, in accordance with the agreements between Mackay Radio and the instrumentalities of The Netherlands and Portuguese governments, will

divert to Mackay Radio "substantial" amounts of traffic handled by Commercial Cable (R. 609-610).

(3) 50% of the traffic of Commercial Cable to The Netherlands and 25% of its traffic to Portugal will be diverted to Mackay Radio (R. 613-614).

(4) The diversion of cable traffic will constitute a substantial reduction of competition between cable and radio (R. 609, 615).

The Commission also made findings which show that the duplicative circuits in question will be operated under "tying" agreements—in restraint of competition:

(1) Under Mackay Radio's agreement with the Netherlands and Portuguese government-controlled radio monopolies, Mackay Radio will receive return radio traffic within the control of the foreign monopolies in proportion to that delivered by it (R. 573, 591).

(2) Much of this return traffic will be in exchange for the cable traffic diverted by AC&R to the radio circuits of Mackay Radio (R. 577-578, 596).

(3) These agreements will operate to give Mackay Radio a competitive advantage over RCAC in securing traffic from those correspondents resulting solely from Mackay Radio's sister cable company (R. 577-578, 596).

Despite these findings, the Commission granted the applications of Mackay Radio based on the majority's newly-evolved theory that duplicative circuits *must* be authorized in the name of competition wherever it is "reasonably feasible" to do so (R. 628). The Commission nowhere in its decision defined its newly-adopted standard of the "reasonably feasible".

The Court below, in rejecting the Commission's newly-invented standard, held:

"It may follow that, as the Commission thought, the proposed competition is reasonably feasible. But that is not the question. The Communications Act authorizes the Commission to grant licenses only if it 'shall determine that public interest, convenience, or necessity would be served by the granting thereof . . .' • • •

• • • • • •

"The Commission said: 'Competition can generally be expected to provide a powerful incentive for the rendition of better service at lower cost. • • • The benefits to be derived from competition should, therefore, not be lightly discarded.' This argument in favor of the Commission's general theory is not a finding that the specific competition here in issue will produce better service or lower rates or any other public benefit. Any implication that benefit will result is contradicted by the Commission's finding (3) above.* The Commission's brief on this appeal speaks in general terms of 'long range' benefits of competition. But in deciding this case the Commission made no finding that long range benefits would result from its grant to Mackay, and nothing in its basic findings would have supported such a conclusion. Its unqualified finding (3) is broad enough to contradict such a conclusion" (R. 698-699, 701).

## Argument.

Section 1 of the Communications Act expresses the Congressional determination that the public interest and

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* The Commission's finding to which the Court below referred as finding 3 reads as follows: "It does not appear that Mackay's proposed service to each of the points at issue will result in lower rates or speedier service, or will otherwise be superior to or more comprehensive than the service now available via RCAC" (R. 605).

the national defense require regulation of common carriers so as to make available a world-wide "wire and radio" communication service, "rapid, efficient" and "with adequate facilities at reasonable charges."

To insure that comprehensive regulation under Title II (the common carrier Title) would achieve those purposes, Congress in Section 309 placed upon the Commission the positive duty of finding that the public interest would be served by every service authorized by it. That statutory standard for the licensing of common carriers is the touchstone for the exercise of the Commission's authority. It is a standard with ascertainable criteria and is to be interpreted by its context, the nature, scope, character and quality of the services involved.

The Court below applied this statutory standard and concluded that the duplicative station licenses here in issue were invalidly granted since the Commission majority had failed to find that public benefit would result and, indeed, had found to the contrary.

Further, in Section 314 Congress recognized that common ownership of cable and radio might be dangerous to the "wire and radio" services it intended to preserve. To set the permissible limits of common ownership of these competing media, Congress borrowed the familiar terms of the Clayton and Sherman Acts, frequently defined and applied by this Court. The Commission's decision sanctioned a substantial lessening and restraint of competition between cable and radio resulting from common ownership of cable and radio carriers and agreements whereby the radio carrier will divert its cable affiliate's traffic in violation of Section 314.

Finally, Congress by Section 313 made all licensees amenable to the antitrust laws. This Section seeks to insure that competition will not be restrained between licensed carriers.

The Commission in granting the certification of public interest, convenience and necessity here involved disregarded the substantial reduction of competition between cable and radio which it found would result. The Commission, moreover, disregarded the contracts under which the circuits would be operated whereby Mackay Radio in exchange for return radio traffic would milk cable traffic from Commercial Cable and give it to the government-owned administrations. Mackay Radio's contract with The Netherlands Administration requires it to give a minimum of 50% of the total radio and cable traffic within the control of the AC&R system.

## POINT I.

### The Court Below Applied the Statutory Licensing Standard in Accordance with the Legislative Intent and Decisions of This Court.

Detailed regulation under the Communications Act of common carriers was intended to prevent the economic extravagance of duplication. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474; 78 Cong. Rec. 10314 (1934). Moreover, Congress intended to make efficient use of the precious and limited national asset of the radio spectrum. *National Broadcasting Co.* v. *United States*, 319 U. S. 190.*

To achieve these purposes in the common carrier field, the "Communications Act forbids competition by all who cannot prove that their entry will serve the 'public interest, convenience or necessity'." *Mackay Radio & Telegraph*

* In the cited case this Court stated: "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." 319 U. S. at 216.

See also, International Telecommunication Convention, Article 42 (Atlantic City, 1947).

*Co., Inc.* v. *Federal Communications Commission*, 68 App. D. C. 336, 338, 97 F. 2d 641, 643 (1938).

In that case ("the *Oslo* case") decided fifteen years ago, the Court below affirmed the Commission's denial of Mackay Radio's application for a duplicating circuit upon findings of the Commission similar to those here made (R. 618). The Court pointed out that the Communications Act does not show "a congressional belief that two radiotelegraph circuits are necessarily better than one [which] would be as strange as a belief that two telephone systems . . . are necessarily better than one . . ." 68 App. D. C. at 338, 97 F. 2d at 643.

Mackay Radio did not seek review of that decision by this Court. However, bills were immediately introduced in Congress providing that, in passing upon applications for direct radio circuits, the Commission "shall consider competition in such communication to be in the public interest." S. 3875 and H. R. 10348, 75th Cong. 3d Sess. (1938). These bills were not enacted, and the Communications Act in the respects here material has remained unchanged.

Thereafter, the Commission, apart from a temporary policy during World War II of the Board of War Communications, followed the *Oslo* case and in a series of cases denied applications for duplicative circuits in the absence of a showing of public benefit.*

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* *Mackay Radio and Telegraph Company*, 6 F. C. C. 562 (1938); *Mackay Radio & Telegraph Co., Inc.*, 8 F. C. C. 11 (1940); *Mackay Radio & Telegraph Co., Inc.*, 12 F. C. C. 478 (1947); *Press Wireless, Inc.* cases, 6 F. C. C. 480 (1938), 11 F. C. C. 250 (1946), 12 F. C. C. 465 (1947), and F. C. C. Docket No. 7822 (decided May 4, 1949; not yet officially reported); and *Postal-Telegraph Cable Co.*, 9 F. C. C. 271 (1943).

In the second of these cases, the Commission denied Mackay Radio's application for a duplicating circuit with Italy since Commercial Cable, Western Union and RCAC competed for traffic comparable to the present Netherlands traffic and in excess of the present Portuguese traffic.

Regulation of common carriers under the Communications Act has its counterpart and model in legislation governing the transportation industry. There Congress sought to achieve an adequate, efficient, and economical system of transportation through close supervision of business operations and practices and recognized that competition resulting from a multiplication of the number of carriers may result in harm to the public as well as in benefit. *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 83-84; *Texas & Pacific Ry.* v. *Gulf, C. & S. F. Ry.*, 270 U. S. 266, 277. At the same time Congress forbade restrictions upon competition caused by arrangements between the licensed carriers. *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439.

In violation of the Congressional policy embodied in the common carrier licensing standard, the Commission here was of the opinion that duplicative radio circuits should be authorized since "reasonably feasible" (R. 628), despite broad findings of an excess of communication facilities (R. 604), of active competition between existing communication facilities (R. 606, 612), and of no resultant public benefit in lower rates or better service (R. 605).*

RCAC's tremendous excess capacity of 90% and 78% over the traffic it carries between the points involved demonstrates that no possible public need exists for the circuits authorized by the Commission (R. 131-132, 516-517, 604).

Furthermore, these authorizations ignored: "The increased crowding of the spectrum [which] has made it extremely difficult to obtain additional frequency assignments for commercial companies operating in the international fixed public service." Seventeenth Annual Report, Federal Communications Commission 59 (1951).

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* The Commission announced that it hereby adopted a "guiding policy" and that if "will" authorize such circuits upon a showing that they are "reasonably feasible". Seventeenth Annual Report, Federal Communications Commission 4 (1951).

The decisions of this Court, cited by Mackay Radio (Pet., p. 7), do not justify the Commission in licensing a new service in the absence of a finding of benefit to the public. *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, involved the construction of a railroad line which was not an intrusion into territory already being well served by another carrier but was necessary to continue the existing competitive situation (283 U. S. at 41).*

In *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, there was no dispute as to the need for the new and different service and the resultant advantages to shippers (326 U. S. at 65, 69-70, 72). As was said in *American Trucking Associations, Inc.* v. *United States*, 326 U. S. 77 at 86, the issue was between the advantages of "improved" rail service and the injury to existing motor carriers. Again, in *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, it had been found that the existing service was inadequate and that the peculiar situation required either granting or denying both the applications to provide the new service (327 U. S. at 530-531).

The rule applicable to the instant case was stated in *Hudson Transit Lines, Inc.* v. *United States*, 82 F. Supp. 153 (S. D. N. Y. 1948), *aff'd* 338 U. S. 802. There an order of the Interstate Commerce Commission authorizing a duplicating service was reversed since it was:

> ". . . not based on any finding that the existing service is inadequate, or that the newly authorized

* Moreover, as the District Court there found, the line was necessary to develop coal-bearing lands which it would tap, to obtain the expected economies from the unchallenged construction of a line by a third carrier, to cause the development of lands tributary to the latter line but owned by the applicant, to aid in the development of the third carrier, and finally to provide a connecting service needed by the public, 35 F. 2d 769, 775-777 (S. D. W. Va. 1929).

operation will secure to the public improved service . . .'' 82 F. Supp. at 158.

The Court below did not substitute its judgment for that of the Commission. Instead the Court ruled, as a matter of law, that "the Commission's basic findings do not support this determination" (R. 699). It held that the essential finding that the specific competition in issue would "produce better service or lower rates or any other public benefit" was lacking and indeed contradicted by the findings made (R. 701). It rightly reversed. *Interstate Common Carrier Council of Maryland, Inc.* v. *United States*, 84 F. Supp. 414 (D. Md. 1949), *aff'd*, 338 U. S. 843; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 64.

## POINT II.

### Reversal of the Commission's Decision May Also Be Sustained on Other Grounds.

The Commission's decision was clearly erroneous in two other vital respects.

#### A. The violations of Section 314

Section 314 of the Communications Act prohibits both control of cable operations by radio and control of radio operations by cable "if . . . the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in . . . the United States . . . and any place in any foreign country . . . or unlawfully to create monopoly in any line of commerce".

As the Court below concluded in the *Oslo* case (68 App. D. C. at 340; 97 F. 2d at 645) and the majority reiterated

in this case (R. 702), the Section is devoted "wholly to an effort to maintain competition between radio circuits on the one hand and telegraph and cable lines on the other." The legislative history of Section 314 is to that effect.*

Prior to the instant decision, the Commission recognized that it is desirable from the standpoint of the public convenience, as well as the national defense, in view of the peculiar advantages of each, to preserve both cable and radio. *RCA Communications, Inc.*, 8 F.C.C. 58, 72-73 (1940); *Mackay Radio & Telegraph Co., Inc.*, 8 F.C.C. 11, 16 (1940).

This national policy in the field of international common carrier communications has recently been reiterated by the President's Communications Policy Board which stated:

> "The fact that both cable and radio facilities are required by the United States for its overseas telecommunications system shall guide consideration of any material matters which affect the availability, in the form of continued operation, of either medium." *Telecommunications, A Program for Progress* 223 (1951).

Thus, to protect the two media against the dangers of control of one by the other and consequent synchronized manipulation of both to the detriment of the public, the permissible limits of such control in the form of common ownership were set in terms borrowed from the Clayton and Sherman Acts.**

This Congressional limitation was here disregarded by the Commission.

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* See 68 Cong. Rec. 2579 (1927) explaining Section 17 of the Radio Act of 1927, 44 Stat. 1162 (1927), the predecessor of Section 314.

** Congress in other statutes has been diligent to maintain competition between different types of carriers. See, *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 84.

The Commission found that during the last few years there has been an increasing effort toward the consolidation of the operations of Mackay Radio and Commercial Cable within the AC&R system (R. 566). This thrust towards integration would, under Mackay Radio's agreements with The Netherlands and Portuguese correspondents, culminate in diversions of "substantial" cable traffic from Commercial Cable to Mackay Radio (R. 609-610). The Commission estimated the diversion to be 50% of Commercial Cable's traffic to The Netherlands and 25% of its traffic to Portugal (R. 613-614).*

This undisputed lessening of competition between cable and radio (R. 615), is "substantial" within the meaning of Section 314. *Standard Oil Co. of California* v. *United States*, 337 U. S. 293; *International Salt Co., Inc.* v. *United States*, 332 U. S. 392; H. R. Rep. No. 1191, 81st Cong. 1st Sess. 8 (1949).

Moreover, the operations of Mackay and the AC&R system under the grants here in issue would unlawfully restrain competition between cable and radio.

> (1) Commercial Cable admittedly would be restrained from competing with Mackay Radio for traffic between the United States and The Netherlands and Portugal. Traffic would be deliberately diverted from Commercial Cable to Mackay Radio (R. 609-610). Thus allocation of trade territories and a pooling arrangement, both illegal *per se*, would result. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593; *Norfolk Southern Bus Corp.* v. *Virginia Dare Transportation Co., Inc.*, 159 F. 2d 306 (4th Cir. 1947), *cert. denied*, 331 U. S. 827.

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* During the last year for which statistics appear in the record, Commercial Cable carried 30.9% and 15.2% of the cable traffic to The Netherlands and Portugal, respectively (R. 612).

(2) In operating under the authorizations here in issue, neither Mackay Radio nor Commercial Cable would determine independently the rates to be charged for their respective services. It is undisputed that joint tariff schedules would be proposed (R. 258-259, 272, 566). Such a price fixing arrangement is illegal *per se*. *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439.

(3) AC&R, under its commitments to the foreign correspondents, may be compelled to transmit messages via Mackay Radio although the sender has chosen to route the message via Commercial Cable (R. 573). This suppression of consumers' choice between alternative and equally important communications media is forbidden. *Lorain Journal Co.* v. *United States*, 342 U. S. 143.

These restrictive practices are forbidden by statute. This Court has decided that common ownership "does not liberate corporations from the impact of the antitrust laws", *Kiefer-Stewart Co.* v. *Seagram & Sons, Inc.*, 340 U. S. 211, 215. That principle is even more clearly applicable when, in contrast to the generality of the Sherman Act, Section 314 expressly prohibits common ownership having the forbidden results.

The present practices of the AC&R system are a relatively recent development. In 1938 it was Mackay Radio's position that, despite their common ownership, Commercial Cable competed as an independent cable company. Hearings on H. R. 10348, 75th Cong. 3d Sess. 14, 15 (1938); Tr. 1850, 1851. The Commission here found that "[d]uring the last few years there has been an increasing effort toward the consolidation of the [companies'] operations . . ." (R. 566).*

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* See also *American Cable and Radio Corp.*, F. C. C. Docket No. 9093, Pars. 103-110 (May 11, 1950) (not yet reported).

**B. The illegal "tying" agreements**

Sections 313 and 314 of the Communications Act extend the applicability of the antitrust laws to licensees and require that competition between cable and radio be maintained. The Commission in this case misconstrued these Sections and erroneously applied the national policy that licensed carriers must compete to the determination of how many carriers should be licensed. At the same time the Commission ignored the uncontradicted fact of violations of the very competitive policy which it invoked.

Mackay Radio and Commercial Cable, wholly-owned subsidiaries of AC&R, furnish service under licenses granted by the Government. This combination of radio and cable companies is unique in the international communications industry.

The contract between Mackay Radio and The Netherlands—and a similar contract exists with Portugal (R. 591)—provides that:

> "Mackay will transmit all its traffic destined to Holland and all traffic of The Commercial Cable Company destined to points in Holland excluding Rotterdam not otherwise routed and guarantee that the volume of traffic transmitted over any 12 months' period shall not be less than 50% of the total volume of traffic within control of Mackay and Commercial Cable destined to all Holland including Rotterdam.
>
> "[The Netherlands] administration will transmit all traffic routed via Mackay by the sender and a portion of its unrouted traffic destined to United States and beyond which will bear to [the administration's] total volume of traffic to or through United States the same ratio which the volume received from Mackay bears to the total volume received from all radio companies in the United States." (R. 501, 502).

The Commission found that under these agreements AC&R would cause the diversion from Commercial Cable to Mackay Radio of substantial cable traffic (R. 609-610). The radio administrations in those countries have agreed to furnish to Mackay Radio, United States-bound traffic in proportion to the radio traffic delivered to them by Mackay Radio (R. 573, 591). In large part, the radio traffic delivered by Mackay Radio to Portugal and The Netherlands would comprise converted cable traffic diverted from Commercial Cable, the revenues from which the foreign administrations would not otherwise share (R. 572, 591).

This ability to shift traffic between its operating subsidiaries so as to obtain non-competitive allocations of return traffic gives AC&R through Mackay Radio an advantage over RCAC, which has no cable affiliation (R. 577-578,596).

These "tying" agreements would illegally restrain trade both as an improper exercise of the unique power of the AC&R system and an abuse of government-granted wave lengths and cable licenses.

The use of such leverage as that of the AC&R system to foreclose competition is forbidden:

> *United States* v. *Griffith*, 334 U. S. 100;
> *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941), *cert. denied*, 314 U. S. 618.

Moreover, the use of a government franchise to restrain competition outside the scope of the franchise has been invariably condemned:

> *United States* v *Paramount Pictures, Inc.*, 334 U. S. 131;
> *International Salt Co. Inc.* v. *United States*, 332 U. S. 392;

*Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488;
*Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661.

The decision of the Commission, which sanctioned these illegal agreements, was clearly erroneous.

## Conclusion.

The Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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## APPENDIX A.

### Communications Act of 1934, 48 Stat. 1064 (1934), as Amended, 47 U. S. C. §151, et seq. (1946).

Section 1. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

Section 309(a). "If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. * * *"*

Section 313. "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and

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* Section 309 was amended subsequent to the issuance of the Commission's decision herein to codify, among other things, that the burden of proof is on the applicant. 66 Stat. 715 (1952), 47 U. S. C. A. §309 (1952 Supp.).

to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. * * *"

Section 314. "After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio * * * shall * * * directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, * * * if * * * the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; * * *."*

* Section 314 also contains prohibitions against the control of radio operations by cable phrased in language substantially identical to that quoted.